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SUPREME COURT U.S.**

No. 565

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**IN THE
Supreme Court of the United States**

OCTOBER TERM, 1950

**RADIO CORPORATION OF AMERICA, NATIONAL BROADCASTING
COMPANY, INC., RCA VICTOR DISTRIBUTING CORPORA-
TION, ET AL., Appellants,**

v.

**THE UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS
COMMISSION, AND COLUMBIA BROADCASTING SYSTEM, INC.**

**Appeal From the District Court of the United States for the
Northern District of Illinois, Eastern Division.**

**SUPPLEMENTAL BRIEF FOR THE UNITED STATES,
FEDERAL COMMUNICATIONS COMMISSION,
AND COLUMBIA BROADCASTING SYSTEM, INC.
IN RESPONSE TO BRIEF FOR APPELLANT-IN-
TERVENOR, EMERSON RADIO AND PHONO-
GRAPH CORPORATION.**

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GRAPH CORPORATION.¹**

Intervenor-appellant Emerson Radio and Phonograph Corporation (herein called "Emerson") contends (Br., pp. 10-12) that this is not a proper case for summary judgment

¹ A stipulation, on file with this Court, between the United States, the Federal Communications Commission and the Columbia Broadcasting System on the one hand, and RCA, NBC, and the Distributing Corporation on the other, fixed the time for exchanging briefs.

The appellant-intervenors were not parties to this stipulation and their briefs were made available to appellees at a later time than the RCA, NBC, and the Distributing Corporation brief. Hence, this supplemental brief is in response to one of the points raised in the Emerson brief.

and that, therefore, the court below erred in refusing to hear additional evidence. The contention appears to rest on the argument that one of the issues before the court was whether asserted improvements in the RCA system, occurring "during and after" the close of the administrative hearings, were of such a nature that the Commission abused its discretion in refusing to consider matters "showing the tremendous improvements made in the RCA system . . ." (Br., p. 11). The question whether the Commission thus abused its discretion, Emerson contends, can be decided only by the court's hearing evidence concerning such alleged improvements in order to determine whether they are "of trifling significance" on the one hand, or "substantial or revolutionary" on the other (Br., p. 11). Emerson urges that in holding that it could not properly hear evidence "for the purpose of showing current developments" (R, 875), the court below was in error.

Emerson's brief on this point may be read either as contending (1) that the court should have heard evidence which was directed to the issue of the nature and extent of RCA "improvements" as disclosed in the RCA Progress Report of July 30, 1950 (our main brief, pp. 126-130), or (2) that the court should have heard evidence designed to show the nature and extent of alleged improvement in the RCA system not covered by, and occurring after the transmittal of, the Progress Report.² But under either hypothesis, Emerson's contention is mistaken since the court below was precluded from hearing such evidence.

It is clear that the question whether the administrative agency has abused its discretion in denying a rehearing or in failing to keep its record open is a question of law.

² It should be noted that in any event no offer of such evidence was presented in such a manner as to raise the issue at all. In the court below, appellants only suggested that on later hearing of a petition for a permanent injunction, they *might* want to introduce testimony of witnesses to establish the improvements in the RCA system (Tr. of Proc., pp. 21, 39, 323.4). The identity of these witnesses, the subject matter of their testimony, and whether the "improvements" were those covered by the Progress Report, or included improvements even after the Commission's Second Report were not stated by appellants.

United States v. Pierce Auto Lines, 327 U. S. 515, 535; *Interstate Commerce Commission v. Jersey City*, 322 U. S. 503, 514-515. The rule in that on judicial review, the question whether the agency abused its discretion must be decided only on the administrative record and not on facts not adduced before the agency. *National Broadcasting Co. v. United States*, 319 U. S. 190, 227. This rule applies as well where the complaint is that the agency abused its discretion in allegedly refusing to consider new matter developed after the close of the administrative record. *Tagg Bros. v. United States*, 280 U. S. 420, 442-445; *National Broadcasting Co. v. United States*, 47 F. Supp. 940, 947 (S. D. N. Y.) affirmed, 319 U. S. 190; cf. *Acker v. United States*, 298 U. S. 426, 433-434.³

If the evidence which Emerson contends the court below was required to hear related to the "improvements" which were called to the Commission's attention in the Progress Report, it is plain that whether the Commission abused its discretion in its treatment of that report must necessarily be determined by reference to what was sought of the agency and what was presented to it. The question whether an agency abuses its discretion in respect of such a matter can be decided only on what was before the agency, and not on what was not submitted to it or on belated exegeses of what was. Cf. *Ripley v. United States*, 220 U. S. 491-496. For it is obvious enough that an agency cannot be charged with abusing its discretion in not giving sufficient weight to that which was not before it.

It is equally clear that evidence concerning alleged improvements not specified in the Progress Report or occur-

³ The district court in *National Broadcasting Company v. United States*, 47 F. Supp. 940, 947 (S. D. N. Y.), affirmed, 319 U. S. 190, stated (per L. Hand, J.) ". . . if the evidence [sought to be adduced in the court] went to contradict or overthrow the findings, we could not bring it into hotchpot with the evidence taken by the Commission, without deciding the issues in the first instance ourselves. We have no such power; it would upset the whole underlying scheme of an expert commission, whose orders must stand or fall upon such evidence as it had before it. . . . If an aggrieved party wishes to supplement that evidence he must apply to the Commission itself, § 405."

ring after the Commission's decision is not permissible for the same reason. Evidence of events taking place subsequent to an agency's decision and not even called to the agency's attention cannot be adduced to show that the agency abused its discretion in reaching its decision. In *Tagg Bros. v. United States*, 280 U. S. 420, 444-445, this Court, through Mr. Justice Brandeis said that "Where it is believed that" the administrative agency "erred in" its findings because "important evidence was not brought to [its] attention, the appropriate remedy is to apply for a rehearing before [it] or to institute new proceedings. [The administrative agency] has the power and the duty to modify [its] order; if new evidence warrants the change. Compare *Interstate Commerce Commission v. Union Pacific R. R. Co.*, 222 U. S. 541, 550." An administrative order of the type here involved, like the "rate order" involved in the *Tagg* case "is not *res judicata*", but "may be superseded by another". *Ibid.* And, indeed, this was explicitly recognized by the Commission in its Second Report (Pars. 16 and 17, R. 420): The Commission invited further experimentation looking toward improved systems and stated that "... when such an improvement does come along, the Commission cannot refuse to consider it merely because the owners of existing receivers might be compelled to spend additional money to continue receiving programs".

Whether the evidence which Emerson contends the court below should have heard instead of granting summary judgment related to the alleged improvements covered in the Progress Report or to later "improvements", the court below could not have heard such evidence without substituting its own judgment for that of the Commission and granting a trial *de novo*. To consider such evidence would have required the court to embark on an inquiry involving the comparative evaluation of the performance of the RCA system as "improved" on the one hand, and of RCA's "unimproved" performance during the hearings on the basis of which the Commission entered its findings and conclusions, on the other hand. Only by such an evaluation could

the court itself determine the issue which is identified by Emerson as the issue involved—whether the alleged improvements are of “trifling significance” or “substantial or revolutionary”. For the word “improvement” is by definition a relative term: It must be weighed in the balance against what is stated to have been improved upon. An inquiry of this nature would constitute the very process of trial *de novo* and substitution of judgment which has been held by this Court to be an improper assumption of administrative authority. *Tagg Bros. v. United States, suprd.*; cf. *Acker v. United States*, 298 U. S. 426, 433-434; *National Broadcasting Co. v. United States*, 319 U. S. 190.

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